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Divisional Court Holds Layoff Following Site Ban Is Not Unjust Dismissal

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In industries such as building services, temporary help and construction, an employer will often send its employees to work at a site controlled by a third party (an owner or landlord) known as a "third party site operator". Usually, the third party site operator has retained the employer to provide a service such as cleaning or security, *etc.*

Under the terms of the contract between the employer and third party site operator, the latter frequently has the right to require the employer to remove any employee from the site, at the third party site operator's discretion. This is referred to as a "third party site ban".

When a third party site ban applies to a non-unionized employee (a rare situation), the employer may elect to reassign the employee to another work location, temporarily layoff[1] the employee, or terminate the employment relationship.

If the third party site ban applies to a unionized employee, an employer will generally not have the discretion to terminate employment of a non-probationary employee absent just cause (subject to the terms of the collective agreement).

The question we are often asked by clients is, *in the case of a unionized employee, if the employer does not have work elsewhere and that employee is laid off, does this amount to an unjust dismissal?*

In a recent case, decided by the Ontario Superior Court of Justice (Divisional Court), and argued by Gerald Griffiths of Sherrard Kuzz LLP, the court found this was not an unjust dismissal. This is good news for any employer whose operations are subject to a third party site ban provision.

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What happened?

GDI Services (Canada) LP ("GDI") performed cleaning and maintenance services in the Toronto-Dominion Centre ("TD Centre") in downtown Toronto, under a contract with the building owner, Cadillac Fairview ("CF"). The contract included a provision that required GDI to *"promptly replace any personnel whose performance or conduct [CF], in its sole opinion, regards as unsatisfactory".*

The Labourers' International Union of North America, Local 183 ("LiUNA") held bargaining rights for all employees of GDI working at TD Centre and the collective agreement was limited to employees working at that site. In November 2016, CF directed GDI to remove one of its employees from TD Centre following an incident CF considered "unacceptable behaviour". As there was no other work available for the employee within the scope of the collective agreement, she was placed on an indefinite layoff. LiUNA filed a grievance alleging the layoff was an unjust termination in violation of the collective agreement.

At arbitration, GDI (represented by Keith Burkhardt of Sherrard Kuzz LLP) argued the employee's layoff was not a termination, nor was it disciplinary. Rather, it was the only recourse available to GDI once the grievor had been banned from work at TD Centre. The arbitrator agreed and dismissed the grievance. LiUNA sought to have the decision judicially reviewed.

Divisional Court holds layoff is not unjust dismissal

The Divisional Court upheld the arbitrator's decision and, in doing so, reviewed what the court described as competing lines of case law on the issue of a third party site ban:

> …there is clearly disagreement on the question of whether taking away the job of an employee … because of a third party site ban can be considered a "layoff" or should be treated as a "termination" requiring that it be justified under the "just cause" provisions of the agreement. Doing the former … has the effect of depriving a vulnerable employee of her employment and of doing so in a manner that gives her no opportunity to defend herself against the accusations that led to that deprivation or to engage the protection of the bargained for "just cause" provisions. Doing the latter requires the employer to continue to employ an employee when, through the actions of a party it cannot control, it has no work for that employee. The interests at stake on both sides are compelling and it is not surprising that the case law reflects disagreement on how those interests should be resolved. As a court reviewing the decision of an expert decision maker it is not our role to resolve the dispute, as yet. However, it is appropriate for us to signal that the dispute exists and that it would be helpful if an attempt could be made to achieve consistency on the matter.

Significantly, the court also noted "the issue of third-party site bans is susceptible to negotiation amongst unions and employers. Individual collective agreements may treat the issue quite differently depending on the needs and wishes of each pairing of union and employer".

Lessons for employers

Whether a site ban enables the layoff of an employee is fact specific. Accordingly, a single answer does not fit all. At the very least, the following best practices are recommended:

- Review existing terms of service with any third party site operator.
- Ensure any third party site ban is clearly and unequivocally communicated by the third party site operator, ideally in a letter or email.
- If a unionized employee is banned from a third party site, consider whether there is any replacement work available (within the scope of the collective agreement). If there is, and the employee is able to perform the work (or there is a position into which the employee can "bump"), this should be offered. If no work is available, subject to any other provision in the collective agreement, the employee may be placed on layoff, which will continue until there is work the employee can perform (either at that site or another site covered by the collective agreement, or the site ban is lifted) or until employment terminates in accordance with the collective agreement.
- If a non-unionized employee is banned from a third party site, consider whether to offer the employee replacement work, place the employee on temporary layoff (if available), or terminate the employment relationship. A layoff will generally continue until the employer recalls the employee to perform work or the layoff crystallizes into a termination under the ESA.

To learn more and/or for assistance contact Sherrard Kuzz LLP.

[1]The Ontario Employment Standards Act, 2000 (ESA) allows an employer to issue a temporary layoff of up to 13 weeks (35 weeks if benefit continuation is provided), after which the layoff is deemed a termination, so long as the employee has agreed, as an express or implied term of employment, to be subject to temporary layoff under the ESA.

DID YOU KNOW?

The proportion of adults aged 25-64 years who worked full year, full time in 2015, is almost exactly 50% across Canada, with a slight dip in Newfoundland and Labrador (47%), British Columbia (45%) and Nunavut (40%). [Statistics Canada per 2016 Census]

Bad Faith Demotion Gives Rise to Significant Damages

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Constructive dismissal may arise when an employee who has not been expressly terminated claims the employer's actions amount to a repudiation of the employment contract. If an employee has been constructively dismissed, the employee is entitled to pay in *lieu* of notice comparable to what would have been received if employment had been terminated without cause and, depending on the severity of the employer's actions, the employee may also be entitled to aggravated damages.

As a recent Ontario Superior Court of Justice decision[1] illustrates, aggravated damages may arise when an employer fails to be candid, reasonable, honest and forthright with an employee.

What happened?

Christopher McLean had been employed as a unionized maintenance technician with Dynacast Ltd. ("Dynacast") for close to 30 years when he was offered and accepted a promotion to the newly created non-unionized position of sales and service technician. He executed a written employment contract entitling him to a salary and sales-based commission. The contract provided that "(a)ny modification to this letter of appointment must be in writing and signed by the parties to it". It also contained a termination provision stating "(i)f your employment is terminated without cause, by providing you with remuneration as in accordance with the Employment Standards Act".

After almost seven years in the new role, McLean was offered a new position refurbishing, maintaining and repairing equipment on the plant floor. Dynacast explained the position change was necessary as sales were down (which was not, in fact, the case). While McLean's salary would remain unchanged, he would no longer have sales duties or be entitled to commission. Instead, he would be eligible for a bonus based on the amount of refurbishing work he completed.

McLean viewed the new position as a demotion from his existing position. When he asked Dynacast what would happen if he declined the offer, he was advised he would be deemed to have resigned.

This is precisely what happened. McLean declined the offer and was deemed to have resigned. He alleged he was constructively dismissed and brought an action for wrongful dismissal. At the time, McLean was 58 years old and had worked with Dynacast for close to 35 years.

The court finds constructive dismissal

The court held McLean had been constructively dismissed as the unilateral change introduced by Dynacast substantially altered the essential terms and conditions of McLean's employment. Specifically:

- a significant portion of the new position involved work of the unionized bargaining unit
- the new work would be on the plant floor and physically demanding; by contrast, his former role was an "office job" where he was able to dress in business casual attire and work in his own office
- the lost commission historically increased McLean's base compensation by approximately 10-15% a year; this could not be replaced by the proposed bonus target based on work completed

As for McLean's entitlement to notice of termination or pay in *lieu*, the court held the termination language in the employment contract did not limit McLean's entitlement to **only** the Ontario *Employment Standards Act,* 2000 (ESA) minimum. Accordingly, McLean was entitled to reasonable notice at common law, which would be significant in light of his age, position and length of service. Generally, "exceptional circumstances" are required before a court will award more than 24 months of reasonable notice. In this case, the court awarded **28 months** on the basis of:

> … the unilateral breach of the governing contract of employment, the radical reconfiguration of the job description, which in my view amounted to a demotion, the mistaken or misguided rationale proffered for the changes and the domineering attitude taken by the defendant through culminating in the unilateral imposition of the changes.

Finally, the court held that McLean's decision not to mitigate by temporarily accepting the new position was reasonable because his return to the plant floor would have been humiliating and embarrassing.

Employer's "bad faith" warrants additional damages

In addition to 28 months of notice, the court awarded McLean **$25,000** in aggravated/moral damages for **bad faith in the manner of its termination**. Specifically, the court found Dynacast:

- was aware it could not unilaterally modify the terms of employment, but nonetheless insisted McLean accept the change in position or be deemed to have resigned
- represented to McLean the change to his role was due to a decline in sales when this was "untruthful and misleading"
- placed unreasonable pressure on McLean to accept the role or face a loss of employment without compensation

Tips for employers

1. **Be wary of "standard" contract terms.** In this case, the employment contract restricted the employer's ability to modify its terms without consent. While standard in many commercial contracts, a non-modification clause in an employment contract can unduly restrict an employer's ability to make changes and should be avoided.
2. **Include an enforceable termination provision in any employment contract.** Had the language of the termination clause been properly drafted to restrict McLean's entitlements on termination to only the minimum payments and entitlements under the ESA, he would have been entitled to only **eight weeks** of termination pay (and severance pay, if applicable), rather than the **112 weeks (28 months)** awarded by the court.
3. **Do not deliberately mislead an employee about the reason for a change.** An employer may fear a candid conversation about why a change is required may upset an employee if related to the employee's own conduct or performance. However, as this decision illustrates, a misleading or untruthful rationale may later be viewed as "bad faith" and give rise to additional damages.

To learn more and for assistance drafting and implementing employment contracts tailored to your workplace, contact the employment law experts at Sherrard Kuzz LLP.

[1]McLean v. Dynacast Ltd., 2019 ONSC 7146

Please join us at our next HReview Breakfast Seminar:

HReview
Seminar Series

Accommodation Update:

New and Important Decisions in Human Rights Law

Workplace accommodation can be a challenge for even the most seasoned HR professional.

Join us as we discuss recent human rights decisions and how they might impact your workplace.

Topics include:

1. Disability Accommodation

- Must an employer accommodate an employee's commute-related restrictions?
- Is an employee entitled to his/her preferred accommodation?

2. Family Status Discrimination

- Must an employer accommodate an employee's child care preferences?
- Does an employer "set a precedent" by agreeing to a flexible start time?

3. Drugs and Alcohol in the Workplace

- Can an employee be terminated for failing to participate in a drug or alcohol test?
- Recent case law on accommodation of a substance use disorder.

DATE: **Wednesday June 10, 2020; 7:30 – 9:30 a.m.** (breakfast at 7:30 a.m.; program at 8:00 a.m.)
VENUE: **Mississauga Convention Centre – 75 Derry Road West, Mississauga ON**
COST: Complimentary
REGISTER: **By May 25, 2020 at https://www.sherrardkuzz.com/events/?data-category=hreview**

NOTE: If it is necessary to postpone this *HR*eview due to COVID-19, we will advise.

Law Society of Ontario, CPD Hours: This seminar may be applied toward 1.5 general CPD hours.
HRPA CHRP designated members should inquire at www.hrpa.ca for eligibility guidelines regarding this *HReview Seminar*.

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